

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL A. MACZKO and U.S. POSTAL SERVICE,
POST OFFICE, Akron, OH

*Docket No. 03-1028; Submitted on the Record;
Issued November 17, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly rescinded its 1985 acceptance of appellant's claim for temporary aggravation of her venous insufficiency.

This case has previously been before the Board.¹ On April 14, 1979 appellant, then a 41-year-old distribution clerk, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on April 12, 1979 she injured her right leg after excessive walking, standing and by being hit by a mail pouch.² On the day of her injury appellant was admitted to a hospital and remained there until May 13, 1979. She returned to work on February 8, 1980 and worked until June 1980, when she stopped due to leg pain. In June 1985 the Office accepted the 1979 claim for aggravation of deep vein thrombosis, thrombophlebitis or postphlebotic syndrome. Appellant did not return to work until April 1985. On October 27, 1988 appellant went on total disability as a result of an emotional claim.

Appellant subsequently filed claims alleging that work activities between February and June 1980 aggravated her venous condition, that her hospitalization in June 1980 was work related and appellant's disability commencing in October 27, 1988, resulted from vascular studies performed on September 23, 1988 or by an increased workload as of October 23, 1988.

The Board's decision dated August 20, 2001 found that appellant's work activities from February to June 1980 did not aggravate her claimed right leg conditions, that her hospitalization in June 1980 was not work related and that appellant's disability commencing on or about

¹ Docket No. 00-531 (issued August 20, 2001); Docket No. 95-2938 (issued March 27, 1998); *see also* Docket No. 93-326 (issued July 19, 1994), *petition for recon. denied*, (issued February 7, 1995); Docket No. 91-1387 (issued January 31, 1992); Docket No. 87-1263 (issued September 30, 1987). The facts of this case as set forth in the Board's previous decisions are hereby incorporated by reference.

² In adjudicating the claim, the Board found that the evidence did not establish that appellant was struck in the leg by a mailbag on April 12, 1979, as alleged.

October 27, 1988 was not precipitated by vascular studies performed on September 23, 1988 or by an increased workload beginning on or about October 23, 1988. In affirming the August 8, 1999 decision of the Office, the Board found the weight of the medical opinion evidence to be represented by Dr. George Anton, a Board-certified vascular surgeon selected as the impartial medical examiner. However, the August 20, 2001 Board decision reversed that part of the Office's August 8, 1999 decision which terminated appellant's wage loss and medical benefits from the 1979 accepted aggravation of her venous insufficiency. The Office found that appellant no longer had residuals of the accepted condition while the Board noted that Dr. Anton found in his September 18, 1998 report that there was no evidence of any arterial or venous pathology to warrant a claim of disability. The Board noted that, although Dr. Anton supported an erroneous acceptance of appellant's claim, his report provided no basis for the Office's determination that residuals of the accepted condition had ceased.³

Following the Board's August 20, 2001 decision, the Office issued a December 21, 2001 decision which found that appellant never sustained the accepted conditions and, therefore, rescinded its acceptance.⁴ The Office's decision credited Dr. Anton's medical report as the weight of the medical evidence.

Appellant requested a hearing and submitted several medical reports already in the record. In an August 17, 1999 report, Dr. Diane Minich, a family practitioner, noted that appellant presented with complaints and symptoms of chronic leg pain. On examination, Dr. Minich found good pulses in the right foot, no real swelling of the foot or leg and a few tender spots in the soft tissues of the calf muscles. Dr. Minich added that appellant could only drive a short distance before her right leg began to hurt and she could only sit or stand in one position for short periods of time. In a November 30, 1999 report, Dr. Minich, stated that magnetic resonance imaging scans, electromyograms (EMG) and other studies had been done, but no cause of appellant's leg pain had been found. She added that appellant's symptoms had persisted since the 1979 incident.

In a November 15, 1999 report, Dr. Carmen Fonseca, a specialist in vascular medicine, that he did not know what was causing appellant's current pain. Dr. Fonseca believed that appellant had thrombosis in 1979, but he was not certain that her pain represented postphlebitic syndrome, as her symptoms were atypical and her tests and physical examinations were normal.

In a December 10, 1998 report, Dr. Nagy Mekhall, a specialist in pain management, noted that appellant presented with pain in the right lower anterior thigh, behind the knee and in the right medial calf. Dr. Mekhall stated that a recent EMG was normal and that a physical examination revealed normal strength in the upper and lower extremities bilaterally, with a normal gait. He added that appellant's right calf and thigh were slightly larger than the left. He

³ Since the Office's termination decision did not correctly state the basis for the grounds of the August 8, 1999 decision, the termination aspect was reversed.

⁴ In its December 21, 2001 decision, the Office also found that appellant failed to establish that she sustained an employment-related condition on or prior to October 27, 1988, that she sustained an injury as a result of a testing procedure or that her hospitalization in June 1980 or that her disability beginning October 1988, was precipitated by the vascular studies or an increased workload. Each of these issues were disposed of in the Board's August 20, 2001 decision.

added that her Homen's test was mildly positive and that there was mild pain on palpation of the medial aspect of the right gastronemius muscle and posterior knee, with no discreet mass or swelling. Dr. Mekhall diagnosed right lower extremity pain of unknown etiology.

At the hearing, appellant argued that Dr. Anton, the independent medical examiner, never provided a clear diagnosis and, therefore, his report was insufficient to meet the Office's burden of proof to terminate compensation. Appellant also argued that, regardless of the subsequent diagnosis denying an original injury occurred, the subsequent events, such as her injuries from testing in 1988 and overwork were compensable factors that ought to be compensable.

In a February 14, 2003 decision, the hearing representative affirmed the Office's December 21, 2001 decision rescinding acceptance of appellant's claim. The hearing representative also affirmed that appellant's work activities from February to June 1980, did not aggravate her claimed right leg conditions, that her hospitalization in June 1980 was not work related and that appellant's disability commencing on or about October 27, 1988 was not precipitated by vascular studies performed on September 23, 1988 or by an increased workload beginning on or about October 23, 1988.

The Board notes that, as to the issues of: (1) appellant's work activities from February to June 1980 aggravating her right leg conditions; (2) appellant's hospitalization in June 1980 was not work related; and (3) whether appellant's disability commencing on or about October 27, 1988 was precipitated by vascular studies performed on September 23, 1988 or by an increased workload beginning on or about October 23, 1988; these issues were previously adjudicated and affirmed by the Board in its August 20, 2001 decision. The additional medical evidence submitted by appellant does not address these issues. Both Dr. Fonseca and Dr. Mekhall stated that they did not know the cause of appellant's symptoms. Dr. Minich addressed various studies but also noted that no cause for appellant's leg pain had been found. The Board finds that the evidence submitted by appellant is not sufficient to overcome the weight of Dr. Anton's impartial medical report on these issues.

On the issue of the aggravation of appellant's venous insufficiency, the Board finds that the Office properly rescinded its acceptance of the claim.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁵ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁶ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁷ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation.⁸ In establishing that its prior

⁵ *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

⁶ *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

⁷ *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

⁸ *See* 20 C.F.R. § 10.610.

acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁹

The basis of the Office's rescission of appellant's claim was the report of the impartial medical examiner. In his September 18, 1998 report, Dr. Anton, a Board-certified vascular surgeon and impartial medical examiner, opined that appellant's disability was not precipitated by vascular studies performed by Dr. Alexander on June 23, 1988. Dr. Anton supported his opinion by noting that diagnostic ultrasounds have been in use for decades and after conducting an in-depth search of medical literature, he could not find one instance where an individual was injured as a result of an ultra sound, a noninvasive procedure. He reviewed appellant's April 23, 1979 venograms which were consistent with deep vein thrombosis. Subsequent studies did not reveal deep vein defects. Based on the diagnostic studies, Dr. Anton opined that the original venogram was a false positive study, while further testing over the years, both invasive and noninvasive, never demonstrated any venous pathology. He stated his conclusion that appellant never sustained a deep vein thrombosis or postphlebotic syndrome and found no evidence of any arterial or venous pathology. Based on this report, the Office properly rescinded acceptance of appellant's claim following the prior Board decision. As noted, Dr. Anton's opinion is well rationalized and based upon a proper medical background. The additional medical evidence submitted by appellant is not sufficient to overcome the special weight accorded Dr. Anton's opinion as the impartial medical examiner. Dr. Minich, Dr. Fonseca and Dr. Mekhall each opined that they did not know the causes of appellant's leg pain symptoms. For this reason, the Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated February 14, 2003 is affirmed.

Dated, Washington, DC
November 17, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).